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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-559

UNITED STATES OF AMERICA, *Petitioner*

vs.

CHESTER FULLER and MAXINE FULLER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief for the Respondents

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Brief for the Respondents

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit (App. 34-39) is reported at 442 F.2d 504.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for the Petitioner.

QUESTION PRESENTED

Whether, in determining the compensation due an owner of land taken by the United States, the jury may consider the availability and accessibility of public lands, so long

as consideration is also given the possibility that the grazing permits on the public land may be withdrawn.

STATEMENT

The Statement in the Brief for the Petitioner is essentially correct. On September 29, 1967, respondents owned in fee 1,280 acres composed of three separate parcels of land near the confluence of the Big Sandy and Bill Williams rivers in western Arizona. These three parcels of land constituted an integral part of a larger cattle ranch operated by respondents and consisting of the basic fee land, land leased from the State of Arizona, and federal land used by respondents under exclusive revocable grazing permits.[1]

On the date stated the United States instituted a proceeding in eminent domain to acquire title to two parcels of respondents' land consisting of a total of 920 acres. At no time prior to or during the pendency of the condemnation action were respondents' grazing permits on the public lands revoked nor were such lands included in the condemnation action.

In the District Court the testimony more than amply demonstrated that respondents were engaging in a large scale cattle operation known as a year-round "cow-calf" ranch. (App. 20) Due to the presence of an abundance of low cost water on the fee lands taken, these areas were cleared, cultivated and irrigated. Year-round grazing could thus be provided for respondents' cattle. When favorable climatic conditions existed the public lands could be used for grazing and the irrigated lands could be harvested for ensilage. Such rotating usage with a dependable water source on the fee lands created a stable operation which

1. Respondents have grazing permits upon the federal land pursuant to the provisions of § 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. Sec. 315b.

allowed the operation of this "cow-calf" ranch as opposed to a "steer" operation (App. 19-20). Testimony showed that in a "cow-calf" operation a breeding herd is maintained to produce a yearly crop of calves and replacement heifers (App. 19). It was shown that such an operation is possible only if a constant source of food is available. This operation is, in the long run, the more profitable and dependable of the two operations (App. 20). In a "steer" operation the rancher purchases steers every year, fattens them on the available feed and then sells them as soon as the desert feed source diminishes (App. 20).

Prior to the trial in the District Court, respondents insisted that the conjunctive use of respondents' fee land with the federal permit and state leased land was evidence which should properly be before the jury and furthermore, that the jury should be allowed to consider the accessibility and availability of the public land upon which appellees held grazing permits *so long as consideration was given to the possibility of the withdrawal of the permits at any time without compensation.* Over objection of the United States this principle was accepted by the District Court and testimony and evidence of the availability and accessibility of permit lands was introduced. At the close of the trial the court, over the objection of the United States, gave the following instruction:

> "During the course of this trial, reference has been made to grazing permits held by the defendants on public land. You are instructed that such permits are mere licenses which may be revoked and are not compensable as such. However, if you should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn or can-

celed at any time without a constitutional obligation to pay the compensation therefor.

"Evidence has been introduced of defendants' use of their deeded land which is being taken, in conjunction with surrounding land owned by the United States, for which defendants have grazing permits, and land belonging to the State of Arizona, which defendants leased. In fixing the fair market value of the fee land being taken and the compensation to be awarded, you are not to award defendants any compensation for the land owned by the United States or the State of Arizona. However, in determining the value of the fee land and in awarding compensation to the owners, you should consider the availability and accessibility of the permit and leased land and its use in conjunction with the fee land taken and give to the fee land such value as, in your judgment, according to the evidence, should be given on account of such availability and accessibility of the permit and leased land, if any. You should also consider the possibility that the permits on the United States land could be withdrawn at any time without constitutional obligation to pay compensation therefor and determine the effect you feel such possibility, according to the evidence, would have upon the value of the fee land." (App. 26-27).

The jury returned a verdict of $350,000 for the 920 acres taken (App. 29). In affirming, the Court of Appeals noted that the case of the *United States v. Rands*, 389 U.S. 121, does not control in this instance because, in enacting the Taylor Grazing Act, Congress:

". . . exercised less than its constitutional power over public lands and recognized special rights against third parties and sometimes the government itself. Unlike navigational servitude, [Rands] there are some private rights and privileges bestowed and protected by the Act which justify the conclusion that the uses to

which federal grazing lands are dedicated are unlike the undiminished public uses of navigable streams." 442 F.2d at 506.

SUMMARY OF ARGUMENT

Consideration of the availability and accessibility of lands for which grazing permits have been issued under the Taylor Grazing Act in determining the value of fee land taken in condemnation is consistent with established precedent. The facts and principles which govern the riparian rights situation as depicted in the *United States v. Rands*, 389 U.S. 121 (1967), are sufficiently distinguishable so as to have no application in situations involving the conjunctive use of fee and Taylor Grazing Act permit lands.

While a fundamental principle of the federal law of eminent domain holds that in arriving at a landowner's constitutionally guaranteed just compensation, the government is not to be charged with value it has created, a perhaps even more fundamental principle of the federal law of eminent domain is that just compensation includes all elements of value, including the fact that the most profitable use of a parcel can be made only in combination with others lands. *Olson v. United States*, 292 U.S. 246 (1934). Unless consideration is given to the existence of adjacent federal permit lands in the condemnation of the fee land and unless these permit lands are considered as appurtenant elements which give added value to the basic fee land, then condemnees are denied the "full and perfect equivalent in money of the property taken." *United States v. Miller*, 317 U.S. 369 (1943).

A determination of the fair market value of a given piece of property requires that consideration be given to all the uses and purposes to which the property is reasonably adaptable and capable of being used. If the highest and

best use of property is in conjunction with contiguous property not owned in fee by the condemnee, this use may nevertheless be shown if it has a definite effect upon the fee land and enhances the market value of that property. *United States ex rel T.V.A. v. Powelson,* 319 U.S. 266 (1943).

The fact that a license, permit or privilege is revocable at the will of the sovereign without liability to pay therefor does not mean that such conditional or qualified rights cannot constitute appurtenant elements of value with regard to the land actually taken, at least so long as such licenses, permits or privileges remain outstanding. It cannot seriously be doubted that respondents' possession of the grazing permits would have been taken into account in negotiations between respondents and a hypothetical willing buyer. Thus, the permit land can be considered as enhancing the market value of the fee land taken.

The government's reliance upon *United States v. Rands,* 389 U.S. 121, is misplaced. The result in *Rands* was bottomed upon the "unique powers over navigable waters which the Constitution bestows upon the federal government." In *Rands* this Court followed two earlier navigational servitude cases, *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53 (1913) and *United States v. Twin City Power Co.,* 350 U.S. 222 (1956). *Twin City* and *Chandler-Dunbar,* supra, clearly point out that where Congress has chosen to legislate in such manner as to recognize certain rights or privileges in navigable streams, the government is required to compensate for the destruction of such rights notwithstanding the fact that Congress had the Constitutional power to regulate navigable streams to the total exclusion of private rights. There are two critical distinctions between the instant case and riparian fast land cases. An analysis of the Taylor Grazing Act (1) leads to the conclusion that Congress exercised less than its Constitutional power over public lands and (2) recognized certain

rights as against third parties and the government itself at least enough so as to justify the rule that permittees' fee land cannot be taken without reference to the value added thereto by the grazing rights.

To reverse the decision and opinion of the Ninth Circuit Court of Appeals in the instant case would be to thwart the overriding public policy which demands that the owner of land taken by condemnation should be made whole. Condemnees should receive in compensation the fair and perfect equivalent of what they had. Those in a position of respondents herein are entitled to be placed in as good a position as they would have occupied had their property not been taken. They are entitled to "market value fairly determined". *United States v. Miller,* 317 U.S. 798 (1943). A landowner whose property is taken in condemnation proceedings is entitled to market value thereof which denotes what it fairly may be believed that a purchaser in fair market conditions would have given. *United States v. Miller,* supra. The government would have this court disregard the reactions of a willing seller and a willing buyer. Its position would require an appraisal based on factors that are not a true reflection of the market and would result in compensation substantially less than that which this court has, by long held precedent, required.

ARGUMENT

The Availability and Accessibility of Public Lands May Be Considered in the Evaluation of Condemned Lands So Long as Consideration Is Also Given the Possibility That the Grazing Permits on the Public Land May Be Withdrawn Without Compensation.

The Taylor Grazing Act, 48 Stat. 1269 (1934) 43 U.S.C. 315 (1958) was passed by Congress in 1934 and was the culmination of a fifteen year political battle over closer federal management of public lands. After generations of

free and unlimited use, range lands had been greatly harmed by range wars and continuing range deterioration.[2] Congress' avowed purpose in passing the Taylor Grazing Act was to benefit and stabilize the livestock industry, to protect grazing rights and privileges and to provide "the most beneficial use of the public range". *Hatahley v. United States,* 351 U.S. 173 (1956); *Chournos v. United States* 193 F.2d 321 (10th Cir. 1952); *Red Canyon Sheep Co. v. Ickes* 98 F.2d 308 (D.C. Cir. 1938). Grazing on public lands had existed traditionally at the sufferance of the Federal government. *Omaechevarria v. Idaho* 246 U.S. 343 (1918). The Taylor Grazing Act replaced that "right by sufferance" with a "right by permission". The courts recognize that both the right to graze and the right to a grazing permit are valuable rights. *McNeil v. Seaton,* 281 F.2d 931 at 934 (D.C. Cir. 1960). While federal courts define the grazing permit as a preference and a privilege, *McNeil,* supra, other courts have considered different ramifications. In *Sproul v. Gilbert,* 225 Ore. 442, 359 P.2d 543 (1961), the rights under the Taylor Grazing Act were held sufficiently possessory to be taxable within the meaning of a statute imposing a tax on property of the United States held under lease.

Yet here, the government, in support of its position, likens respondents' Taylor Grazing Act permits to "business opportunities" (Brief of Pet. 7). Respondents fail to perceive the similarity between the cases which have held that where the government condemns property it shall not have to pay for opportunities which the owner may lose, (*United States ex rel T.V.A. v. Powelson* 319 U.S. 266 1943) frustrated business opportunities, (*Omnia Commercial Co. v. United States,* 261 U.S. 502 1923) or consequential destruction of a business (*Mitchell v. United States* 267

2. Calef and Wesley *Private Grazing and Public Lands* (1960).

U.S. 341) and the facts which give rise to the instant case. It is not the frustration of a business opportunity which results from the condemnation or respondents' land but is instead the taking of an already existing use of the permit lands in conjunction with those held in fee, the kind of large scale cattle operation made uniquely possible by the existence of the permit lands. Thus the condemnation does not affect some potential benefits but instead a use of land under an existing permit. It is widely conceded that a landowner may have taken into consideration in the evaluation of his property for condemnation purposes the proximity of schools, roads, markets, water and other environmental appurtenant elements of value. 2 Lewis, *Eminent Domain,* § 721 (3rd Ed.); *United States v. Jaramillo* 190 F.2d 300, 302 (10th Cir. 1951).

The dissent in *United States v. Cox* 190 F.2d 293 (10th Cir. 1951), *cert. denied,* 342 U.S. 567, very ably pointed out the fallacy in attempting to distinguish the aforementioned appurtenant elements of value from the existence of grazing permits. The following illustration and analogy was used:

> Let us assume that an individual owns a block of land in a city on which he has constructed his home; that it is situated on a two lane parkway street with the parkway beautifully landscaped; that adjacent to the home there is located a public park and a public school which enhance the value of his block of land; that the municipality owning the public park, street and the public school decides to demolish the school and to utilize the school grounds, the street and the public park for the construction of a stadium and for parking space and roadways leading thereto and that it sought to condemn the presently owned block of land to be included in the project. Obviously any enhancement of value that would result from the construction of the project could not be considered at arriving at

> the value of the individual's privately owned block of land. Likewise it seems to me that the municipality could not urge that in determining the market value of the privately-owned land at the time of the taking, consideration could not be given to the enhancement of value resulting from the public park, parkway street and public school, because it was contemplated that in the future the park, the parkway street and school building would cease to exist and would no longer be available. I emphasize that the question is not consequential damages resulting from the taking away of the park, parkway street and the school for other public purposes, but the value of the privately-owned land taken in its environment at the time of the taking. 190 F.2d 293, 299 (10th Cir. 1951) *cert. denied* 342 U.S. 567.

The fact that respondents had the exclusive right to use the public lands upon which they held federal grazing permits does not distinguish the public lands in the case at bar from the environmental factors considered in *United States v. Cox,* 190 F.2d 293 (10th Cir. 1951) and *United States v. Jaramillo,* 190 F.2d 300 (10th Cir. 1951). In fact, according to the general federal rule defining market value, it is proper to take into consideration the availability and accessibility of permit land as an appurtenant element of value for ranching purposes, provided that consideration is given to the possibility that the permits could be withdrawn or canceled by the government at any time. *United States v. Jaramillo,* supra. The general rule is further set forth at 4 Nichols, *Eminent Domain* p. 59 (Rev. 3rd ed. 1963):

> Whatever in its location, surroundings, and appurtenances contributes to the availability of land for valuable uses is proper evidence for consideration in estimating the salable character of land and in ascertaining its market value. Generally speaking, the true rule seems to be to permit proof of all the varied element

> of value; that is, all the facts which the owner would properly would naturally press upon the attention of a buyer with whom he is negotiating a sale and all the facts which would naturally influence a person of ordinary prudence desiring to purchase.

There is no doubt that respondents' possession of the grazing permits would be taken into account in negotiations between them and a hypothetical willing buyer. This being so, then the government permit can be considered as enhancing the market value of the property in a condemnation proceeding. *Ciriarte v. United States,* 157 F.2d 105, 111 (1st Cir. 1946). Cf., *United States v. Citrus Valley Farms, Inc.,* 350 F.2d 683 (9th Cir. 1965). While § 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended 43 U.S.C. 315b, provides that the issuance of a permit pursuant to the provisions of that subchapter shall not create any right, title, interest or estate in or to the land, such statutory provision does not and cannot foreclose the fact that the existence of unrevoked grazing permits is an element of value which should be taken into account in determining the fair market value of the base lands owned in fee. It is quite clear that Congress, in specifically providing that such grazing permits shall not create any right, title, interest or estate in or to the lands, intended that it make quite clear the governmental policy that the issuance of a permit would vest no interest in the permittee which interest the permittee could then claim *in fee.* Clearly, however, Congress did not intend by this section that the existence of the permit was to be of no value to the holder thereof.

One of the primary indications that what the permittee receives is in fact a right, is the provision in the Act for transference of the right, either as an appurtenance to the base property or to entirely new base property. The Range

Code (43 C.F.R. § 4110, 1968) provides that in instances where base property is transferred, the right follows it unless the grantor of the base saves the right by transferring it to other property of his which qualifies as base property. 43 C.F.R. § 4115.2-2 (1968).

Since the early days of the Act's administration, boards of local stockmen have worked in an advisory capacity with the local grazing district manager regarding district affairs. The district manager is required to seek the advice of the local permittees before promulgation of any rule or regulations affecting the administration of the district. 43 U.S.C. § 315o-1(b).

Though the government strongly relies on that provision of the Act which provides that the issuance of a permit "shall not create any right, title, interest, or estate in or to the lands" (43 U.S.C. § 315b), one commentator, in discussing that provision has made the following analysis thereof:

> "Essentially the Taylor Act seems to be a vehicle for implementing the policy of Congress to regulate the use of federal lands. It might be described as the earliest attempt at a resource use concept by Congress. To implement this regulation of the range, Congress provided for a system of regulating grazing use of federal land, such regulation to be administered locally through grazing districts, with the advice and recommendations of the local users. The regulated use would be implemented by the granting of exclusive use permits to livestock grazers who met the qualifications provided in the Act and the regulations of the Secretary. *The Act provided that these did not give vested rights in the land, but were privileges. But the question remains, what was meant by privileges?*" Ragsdale, *§3 Rights Under the Taylor Grazing Act*, 4 Land and Water L. Rev. 399 (1969)

As respondents have noted, petitioner contends that *United States v. Jaramillo*, 190 F.2d 300 (10th Cir. 1951) was wrong, relying on this court's navigational servitude cases, the most recent of which is *United States v. Rands*, 389 U.S. 121 (1967). There, the court held that the compensable value of private riparian fast lands taken by the government did not include its special value as a port site since the owner had no right of access to the navigable waters which could be legally protected as against the United States. Respondents contend that a careful examination of the rationale of the navigational servitude cases and the federal legislation regarding grazing permits gives rise to a basis for distinguishing the cases relied upon by the government. The result in *Rands* was bottomed upon the "unique" powers over navigable waters which the Constitution bestows upon the federal government:

> "The commerce clause confers a unique position upon the government in connection with navigable waters." The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States . . . For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress . . . This power to regulate navigation confers upon the United States a "dominant servitude," . . . which extends to the entire stream and the stream bed below ordinary high water mark. *The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. . . .*" 389 U.S. at 122-123.

In so holding, this court followed two earlier navigational servitude cases, *United States v. Chandler-Dunbar Water*

Power Co., 229 U.S. 53 (1913) and *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). The earlier case, *Chandler-Dunbar*, held that the riparian owner had no right to compensation for the value of its fast lands attributable to its suitability for use as a power site. The rationale for the decision is found in the following passage:

> "The government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner *who had no right to appropriate the current to his own commercial use.*" 229 U.S. at 76 (emphasis added)

In *Twin City*, the "dominant navigational servitude" was held to entitle the government to pay for land condemned without reference to the land's special value as a site for a hydroelectric power operation. As was the case in *Chandler-Dunbar*, the court's decision in *Twin City* was based upon the fact that the superior navigation easement "displaces all competing interests and appropriates the entire flow of the river for the declared public purpose." (350 U.S. at 225.) It is significant that the opinion in *Twin City*, makes plain that where Congress has chosen to legislate in such manner as to recognize certain rights or privileges in navigable streams, then the government is required to compensate for the destruction of such rights notwithstanding the fact that Congress had the Constitutional power to regulate navigable streams to the total exclusion of private rights:

> "The legislative history and construction of particular enactments may lead to the conclusion that Congress exercised less than its Constitutional power, fell short of appropriating the flow of the river to the public domain, and provided that private rights existing under the state law should be compensable or otherwise recognized." 350 U.S. at 225

An example of Congressional recognition of rights in navigable streams is found in *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1934), where the Federal Water Power Act authorized diversion of waters of a navigable stream for power purposes. The effect of the legislation upon the dominant navigational easement was described as follows:

> "We conclude, as did the Court of Appeals, that, even though respondent's water rights are of a kind that is within the scope of the government's dominant servitude, the government has not exercised its power to abolish them." 347 U.S. at 248

By allowing the deduction of the water right expenses in the company's accounting to the F.P.C., the court in *Niagara Mohawk*, supra, recognized the rights granted by the Act as something of value which value cannot be ignored by the government on the theory that it owns the whole stream to the exclusion of all other rights.

Herein lies one of the two critical distinctions between the instant case and the riparian fast lands cases like *Rands, Twin City* and *Chandler-Dunbar*. An analysis of the Congressional enactment creating, regulating and protecting respondents' grazing permits would lead to the conclusion that Congress exercised less than its constitutional power over public lands and recognized certain rights as against third parties and the government itself—at least enough of a "right to appropriate [the use of such lands] to their own commercial use". *United States v. Twin City Power Co.*, 350 U.S. 222, 225 (1956); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913). Thus, justification is found for the rule that fee lands of Taylor Grazing Act permittees cannot be taken without reference to the value added thereto by the grazing permits.

There exists another basis for distinguishing cases like *Rands, Twin City* and *Chandler-Dunbar*. In those cases the issue was whether the government was required to pay as compensation for lands taken some additional theoretical value thought to be represented by the use to which such lands could but had not yet been put, e.g., port sites, hydro-electric power operations. Not only had such developments and investments not, in fact, taken place, there was an absence of any kind of Congressional invitation, expressed or implied, to utilize the navigable waters as part of a private commercial enterprise.

That compensation will be found owing for the value represented by *investments actually made* at the request of the government in using public navigable waters is demonstrated by the court's decision in *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). There the government was required to pay the going-concern value of a toll lock and dam built at the implied invitation of the government. The dispositive facts and rationale of the case are stated as follows in a subsequent decision of this court:

> "In the *Monongahela Nav. Co.* case the property which was taken was a lock and dam built by the company pursuant to the invitation of the United States and the state of Pennsylvania, the latter in consideration for giving the company a franchise to exact a toll.
>
> . . . .
>
> The lock and dam constituted, in effect, a going-concern whose value was, of course, affected by what it would produce." *Omnia Commercial Co. v. United States*, 261 U.S. 502, 513 (1923).

So also must respondents' ranch land and the rights represented by the federal grazing permits be considered as a "going-concern" the value of which is "affected by what it would produce". This is the kind of appraisal it would have

received by a willing and knowledgeable buyer in the market place. While recognizing that *Monongahela* has been read primarily for the proposition that the government is estopped from evaluing land taken without reference to improvements and investments made at the invitation of the government (*United States v. Rands* 389 U.S. at 126; *Omnia Commercial Co. v. U.S.* 261 U.S. at 513-14), the differences between that case and the one at bar are differences only of degree and not of substance.

Here Congress, through the Taylor Grazing Act, saw fit to permit, regulate and protect preferential grazing rights such as the respondents' in order to provide for the beneficial use of the public lands and to stabilize and strengthen the western cattle industry. To attempt to put a value upon respondents' fee lands without considering the actual "going concern value" as enhanced by the availability of the grazing permits is to deny that which exists in reality. This is the approach taken in *Monongahela.* No actual or justifiable reliance upon such a government program having taken place in *Rands, Twin City* or *Chandler-Dunbar,* those cases did not invoke that doctrine.

The government concedes that *Rands* is distinguishable from the instant case because the government's navigational servitude is absolute while private rights bestowed under the Taylor Grazing Act make the government's rights in grazing lands less absolute. (Brief of Pet. 14-15) There can be no argument, therefore, that what application Rands has or had to the facts of the instant case was merely an application by analogy and thus the imposition upon the instant facts of the rationale of *Rands* is particularly inappropriate in view of subsequent legislation.

Congress, in enacting § 111 of the River and Harbor Act of 1970, 84 Stat. 1821, 33 U.S.C. 595a, specifically provided:

"In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property to be taken by the United States above the normal high water mark of navigable waters of the United States *shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters. . . .*" 84 Stat. 1821, 33 U.S.C. § 595a *(emphasis supplied)*

The Brief of Petitioner, in discussing this Congressional enactment, which applies a test for evaluation nearly identical to that with which the jury was charged in the instant case, attempts to minimize the significance of that enactment by pointing out that 33 U.S.C. 595a refers only to takings for improvement of navigable rivers and waterways while *Rands* dealt with riparian taking for hydroelectric projects or any other purpose.

Clearly, both *Rands* and the subsequent Congressional enactment, 33 U.S.C. 595a, both refer to riparian takings and are therefore factually distinguishable from the instant case. Thus the government must concede that it is only *by analogy* that either *Rands* or 33 U.S.C. 595a would have any application in the determination of this case. The petitioner appears to overlook the crucial fact that 33 U.S.C. 595a represents a Congressional "setting aside" of the onerous rule of *Rands* thereby *eroding the rationale of Rands* as authority for denying an evaluation to be placed upon fee lands due to their contiguity to navigable streams or, in this case, grazing permit lands.

The fact which must not be forgotten is that the issue in this case is not whether a rancher has a Fifth Amendment right to compensation for the taking of a grazing permit but whether the availability of *unrevoked* Taylor Grazing Act permits can be considered by the jury under proper instructions in determining the value of the private fee lands actually taken by the government. By instructing the jury that they could do so the trial court correctly followed the principles of the only federal decision on point, *United States v. Jaramillo* 190 F.2d 300 (10th Cir. 1951) As in *Jaramillo,* respondents' grazing permits had not been revoked or cancelled at the time the fee land and state lease lands were taken by right of eminent domain. Thus respondents should be permitted to value or establish the carrying capacity of their fee land as it was actually developed and utilized, that is, in conjunction of the surrounding federal grazing lands. Only in this manner can respondents be given the full and perfect equivalent in money of the property taken and be "put in as good a position pecuniarily as they would have occupied if their property had not been taken. *United States v. Miller* 317 U.S. 369, 373 (1943).

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted,

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